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Federal Communications Commission  
Washington, D.C. 20554

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FCC 07-143

In the Matter of

Reexamination of Roaming Obligations of  
Commercial Mobile Radio Service Providers

WT Docket No. 05-265

## REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein approving in part, concurring in part, and issuing separate statements.

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## I. INTRODUCTION

1. In this Report and Order, we clarify that automatic roaming is a common carrier obligation for commercial mobile radio service (CMRS) carriers,<sup>1</sup> requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act. We reiterate the Commission's earlier determination that roaming is a common carrier service because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.<sup>2</sup> Thus, the provision of roaming is subject to the requirements of Section 201, 202, and 208 of the Communications Act.<sup>3</sup>

2. We determine that when a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier's home market, consistent with the protections of Sections 201 and 202 of the Communications Act. We also find that the common carrier obligation to provide roaming extends to services that are real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Additionally, we decline to sunset the

<sup>1</sup>"Commercial mobile service" is defined to mean "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). See also 47 C.F.R. § 20.3 defining "Commercial mobile radio service" as "[a] mobile service that is: (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section."

<sup>2</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9468-69 ¶ 10 (1996) ("*Interconnection and Resale Obligations Second Report and Order*" and "*Interconnection and Resale Obligations Third NPRM*," respectively).

<sup>3</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 05-265, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) ("*Reexamination NPRM*"); *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd 9463-71 ¶¶ 1-14. See also 47 C.F.R. § 20.15. Section 332(c)(1) of the Act provides that a person engaged in the provision of a service that is a commercial mobile service shall be treated as a common carrier for purposes of the Act. See 47 U.S.C. § 332(c)(1).

existing manual roaming requirement at this time to provide additional flexibility for consumers. We note that roaming, as a common carrier obligation, does not extend to services that are classified as information services or to services that are not CMRS.<sup>4</sup>

3. We recognize that today CMRS consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area. We believe our findings and clarifications in this Report and Order with respect to CMRS providers' obligations regarding roaming services serve the public interest and safeguard wireless consumers' reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming.

4. Finally, in the Further Notice of Proposed Rulemaking, we seek comment on whether the roaming obligation should be extended to non-interconnected services or features, including services that are classified as information services, or to services that are not CMRS.

## II. BACKGROUND

5. "Roaming" occurs when the subscriber of one CMRS provider utilizes the facilities of another CMRS provider with which the subscriber has no direct pre-existing service or financial relationship to place an outgoing call, to receive an incoming call, or to continue an in-progress call.<sup>5</sup> Typically, although not always, roaming occurs when a subscriber places or receives a call while physically located outside of the service area of its "home" CMRS provider. The basic technical requirement for roaming, whether done manually or automatically, is that the subscriber has a handset that is capable of accessing the roamed-on (host) system.<sup>6</sup>

6. There are two forms of roaming -- manual and automatic. With manual roaming, the subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call.<sup>7</sup> Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service. By contrast, with automatic roaming, the roaming subscriber is able to originate or terminate a call without taking any special actions.<sup>8</sup> Automatic roaming requires a pre-existing contractual agreement between the

<sup>4</sup> Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901, ¶¶ 11-12 (2007) ("*Wireless Broadband Internet Access Declaratory Ruling*"); 47 C.F.R. § 20.9.

<sup>5</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15048 ¶ 2. Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, 15 FCC Rcd 21628 ¶ 2 (2000) ("*2000 CMRS Roaming NPRM*"); *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 ¶ 3. Section 22.99 of the Commission's rules describes a "roamer" as "[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber." 47 C.F.R. § 22.99.

<sup>6</sup> See *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21629 ¶ 2; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9466 ¶ 7.

<sup>7</sup> Manual roaming is the only form of roaming that is available when there is no pre-existing contractual relationship between a subscriber, or her home system, and the system on which she wants to roam. See *Reexamination NPRM*, 20 FCC Rcd at 15049 ¶ 3.

<sup>8</sup> This form of roaming is sometimes referred to as "seamless" roaming. However, some parties understand "seamless" roaming to include handoff of calls in progress as one moves from the service area of one provider to another. For the sake of clarity, we use the term "automatic" roaming to refer to origination and termination of calls without the need for any special facilitating action by the subscriber. See *Reexamination NPRM*, 20 FCC Rcd at 15049 ¶ 3.

subscriber's home system and the host system.<sup>9</sup>

7. *1981 Manual Roaming Order.* The Commission first adopted roaming requirements in 1981 as part of the original cellular service rules.<sup>10</sup> Under these rules, cellular carriers were required to offer manual roaming.<sup>11</sup> The Commission determined that requiring cellular carriers to provide roaming would further the public interest in providing, to the greatest extent possible, a "nationwide high-capacity mobile communications service capable of providing local and roaming mobile telephone users the ability to place and receive calls."<sup>12</sup> In 1994, after passage of the Omnibus Budget Reconciliation Act (OBRA) of 1993,<sup>13</sup> the Commission undertook a comprehensive review of CMRS-related issues, including roaming. The Commission considered among other issues, whether "the obligation to permit roaming should be extended to all CMRS" and inquired as to the regulatory standard necessary to promote roaming.<sup>14</sup>

8. *1996 Manual Roaming Order and Further Notice.* In 1996, the Commission extended its original cellular roaming rules to the Broadband Personal Communications Service (PCS) and the Specialized Mobile Radio Service (SMR), the other CMRS carriers at that time that were competing with cellular in the provision of real-time, two-way voice services.<sup>15</sup> The Commission's decision began by noting that Sections 201(b) and 202(a) of the Communications Act, which govern common carrier communications services, are applicable to CMRS providers.<sup>16</sup> The Commission rejected BellSouth's argument that "roaming was merely a billing arrangement and not a common carrier service."<sup>17</sup> The Commission stated that "[r]oaming capability . . . gives end users access to a foreign network in order to communicate messages of their own choosing. We therefore agree with those commenters that argue that roaming is a common carrier service."<sup>18</sup> The Commission also reasoned that roaming met the statutory

<sup>9</sup> See *id.* See also *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21629-30 ¶ 4; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465-66 ¶ 6.

<sup>10</sup> See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, CC Docket No. 79-318, *Report and Order*, 86 FCC 2d 469 (1981) (*Cellular Report & Order*) (adopting requirement in then Section 22.911(b) of the Commission's rules that base stations render service to properly licensed roamers).

<sup>11</sup> See 47 C.F.R. § 22.901 (1995); 47 C.F.R. § 22.911(b) (1981).

<sup>12</sup> See *Cellular Report & Order*, 86 FCC 2d at 490 ¶ 75.

<sup>13</sup> See Omnibus Budget Reconciliation Act of 1993, Title VI, § 6002(b)(2)(A), (B), (OBRA), 47 U.S.C. §§ 303(n), 332; Communications Act of 1934 as amended (Communications Act) §§ 203, 204, 205, 211, 212, and 214. Section 332 defines CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

<sup>14</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465 ¶ 4 (citing Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Notice of Proposed Rule Making and Notice of Inquiry*, 9 FCC Rcd 5408 (1994) and *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Notice of Proposed Rule Making*, 10 FCC Rcd 10666 (1995)).

<sup>15</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 ¶ 2, 9470-71 ¶¶ 12-14. The Commission stated that "we conclude that the public interest will be served by extending our existing manual roaming rule, which is part of our cellular service rules, to obligate all CMRS licensees competing in the mass market for real-time, two-way voice services and to protect the subscribers of all carriers offering such services. That group consists of cellular, broadband PCS and covered SMR providers." See *id.* at 9470 ¶ 12.

<sup>16</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9468-69 ¶ 10.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

requirements of CMRS and, by that statutory definition, could be considered to be offered as a common carrier service -- *i.e.*, interconnected and offered for profit to a substantial segment of the public.<sup>19</sup> The Commission also noted that it had the statutory authority to impose a roaming requirement as a licensing condition.<sup>20</sup> The Commission, thus, set out the two pillars of its statutory authority with respect to roaming under Title II and III of the Act.

9. The Commission then conditioned the grant of cellular, broadband PCS, and covered SMR licenses under Sections 303(r) and 309 of the Act on compliance with its manual roaming rule.<sup>21</sup> The Commission also discussed its manual roaming regulation in the context of the broader general obligations that CMRS providers have as common carriers. The Commission reminded all CMRS carriers that, irrespective of their regulatory obligations for manual roaming, they would still be subject to the complaint process of Section 208, stating “[a]llegations that particular practices by non-covered CMRS providers [*i.e.*, those not covered by the extended manual roaming rule] are unjust, unreasonable or otherwise in violation of the Communications Act would be grounds for complaint under Section 208 of that Act.”<sup>22</sup>

10. The Commission, however, declined to adopt an automatic roaming rule at that time.<sup>23</sup> The Commission stated that the record on this issue was “inconclusive” and decided to seek comment on the issue in a related *Third Notice of Proposed Rulemaking (Third NPRM)*.<sup>24</sup> As part of the *Third NPRM*, the Commission sought comment on whether it should require carriers to provide “automatic” roaming on a non-discriminatory basis. The Commission also specifically sought additional comment on whether it should require cellular, broadband PCS and certain covered SMR licensees that enter into automatic roaming agreements to make like agreements available to similarly situated providers, where technically compatible handsets are being used, under nondiscriminatory rates, terms, and conditions.<sup>25</sup>

11. *2000 Rulemakings*. In August 2000, in a *Memorandum Opinion and Order*, the Commission generally affirmed the manual roaming requirement it had adopted in 1996, while modifying the definition under which CMRS providers were “covered” and extending the rule’s application to certain data providers.<sup>26</sup> Thus, the manual roaming requirement, as amended, applies to all cellular, broadband PCS, and SMR providers that “offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.”<sup>27</sup> In this order,

<sup>19</sup> The Commission noted that roaming meets all the statutory elements of commercial mobile radio service, and therefore, of common carriage: “roaming satisfies the statutory elements of CMRS, and is thus a common carrier service, because it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public.” *See id.* at 9469 ¶ 10 n.30 (citing 47 U.S.C. § 332(d)(1)).

<sup>20</sup> *Id.* at 9469 ¶ 10.

<sup>21</sup> *Id.* at 9471 ¶ 13.

<sup>22</sup> *Id.* at 9472 ¶ 14.

<sup>23</sup> *See id.* at 9472 ¶ 16.

<sup>24</sup> *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9473 ¶ 17.

<sup>25</sup> *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9475 ¶ 22.

<sup>26</sup> *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 15975 (2000) (“*Interconnection and Resale Obligations Third Report and Order*” and “*Interconnection and Resale Obligations MO&O*,” respectively).

<sup>27</sup> *See Interconnection and Resale Obligations Third Report and Order*, 15 FCC Rcd at 15990 ¶ 18.

the Commission terminated consideration of the automatic roaming issues raised in the *Third NPRM*, finding that subsequent developments in the market and technology had rendered the record stale.<sup>28</sup>

12. Subsequently, in November 2000, the Commission initiated a new proceeding to consider whether the Commission should adopt an automatic roaming rule that would apply to CMRS systems and whether the Commission should sunset the manual roaming requirement that currently applies to those systems.<sup>29</sup> In the *Notice of Proposed Rulemaking (2000 NPRM)*, the Commission specifically sought comment on: (1) whether to adopt an automatic roaming rule and if so, how such a requirement should be designed and implemented; and (2) whether the existing manual roaming rule and/or any automatic roaming rule that might be adopted should sunset and, if so, when.

13. Since the *2000 NPRM*, the Commission has discussed roaming issues in the context of its review and consideration of several wireless mergers, including Cingular/AT&T Wireless, ALLTEL/Western Wireless, and Sprint/Nextel. In the Cingular/AT&T Merger Order, the Commission explicitly based its analysis of roaming issues on “the potential harm to consumers of mobile telephony services, rather than to mobile telephony providers.”<sup>30</sup> The Commission found that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices, stating that “an overall disciplinary force in the context of the intercarrier market for roaming services is that customers of various firms always have the option to switch to firms employing other air interfaces.”<sup>31</sup> In the ALLTEL/Western Wireless and Sprint/Nextel orders, the Commission noted that if a roaming partner believes that ALLTEL or Sprint is charging unreasonable roaming rates, it can file a complaint with the Commission under Section 208 of the Communications Act.<sup>32</sup> The Commission recognized, however, that the manual roaming requirement and the ability to file a Section 208 complaint may not fully address the concerns raised by the commenters. Given the broad scope of some of the competitive concerns raised in the mergers, many of which seemed to call for a reevaluation of the Commission’s roaming rules and policies, the Commission determined that it was appropriate to address those concerns in the context of a rulemaking proceeding to consider the Commission’s roaming rules and requirements applicable to CMRS providers under current market conditions and developments in technology.<sup>33</sup>

<sup>28</sup> *Id.* at 15982-83 at ¶¶ 22-24.

<sup>29</sup> See *2000 CMRS Roaming NPRM*, *supra*, n. 5.

<sup>30</sup> See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21588 ¶ 172 (2004) (“*Cingular-AT&T Wireless Order*”).

<sup>31</sup> See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21591 ¶ 180.

<sup>32</sup> See Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13093 ¶ 109 (2005) (“*ALLTEL-WWC Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13093, 14012-13 ¶ 127 (2005) (*Sprint Nextel Order*). See also Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002444650, 0002444656, 0002456809, *Memorandum Opinion and Order*, 21 FCC Rcd 7358 (2006) (denying SouthernLINC’s request that approval of the transaction be conditioned on the requirement that Sprint Nextel provide automatic roaming for iDEN voice, digital dispatch and data services at reasonable/non-discriminatory rates and terms).

<sup>33</sup> See *ALLTEL-WWC Order*, 20 FCC Rcd at 13093 ¶ 109. In approving these merger proposals, the Commission noted that “our manual roaming rule requires other carriers to complete calls initiated by Cingular’s [ALLTEL’s or Sprint’s] customers where Cingular [ALLTEL or Sprint] cannot because it has neither its own signal nor an automatic agreement.” See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13053 at 13093 ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127. In addition, to (continued....)

14. *2005 Reexamination NPRM*. In August 2005, the Commission released a *Memorandum Opinion and Order and Notice of Proposed Rulemaking (Reexamination NPRM)*, which terminated the pending 2000 NPRM and initiated a new proceeding to re-examine whether the Commission's current rules regarding roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market.<sup>34</sup>

15. In the *Reexamination NPRM*, the Commission sought to develop a record, with up-to-date information on the state of roaming in today's CMRS marketplace, in order to determine what regulatory regime would be appropriate for roaming services.<sup>35</sup> The *Reexamination NPRM* sought comment on issues related to manual and automatic roaming, including issues concerning roaming negotiations, regional and rural carrier's concerns, technical considerations, and the impact of recently approved mergers on the availability of roaming services.<sup>36</sup> The *Reexamination NPRM* asked commenters to discuss in detail, and provide economic analysis on, whether changes in the CMRS industry have had any positive or negative effect on the availability of roaming to consumers.<sup>37</sup>

16. In response to the *Reexamination NPRM*, twenty one parties filed comments and twenty four parties filed reply comments.<sup>38</sup> The record represents all segments of the CMRS industry, including nationwide carriers, regional and small carriers, trade associations, and cooperatives. A number of commenters included economic testimony analyzing the CMRS marketplace in terms of the availability of roaming services and prices.<sup>39</sup> In addition to filing comments, a number of parties made *ex parte* presentations to Commission staff.

17. *Section 403 Petition*. On April 25, 2006, AIRPEAK, Airtel, Cleveland Unlimited, Leap, MetroPCS, Punxsutawney, RTG, and SouthernLINC ("Petitioners"), filed a Joint Section 403 Petition requesting that the Commission affirmatively regulate automatic roaming. Petitioners contend that the record in the roaming proceeding does not contain sufficient specific concrete data on roaming rates and practices, and they ask the Commission to initiate an inquiry for the purpose of gathering and inspecting a

(Continued from previous page)

further ensure compliance, the Commission stated that "we adopt as a condition to our grant in this Order a reciprocal duty, *i.e.*, that Cingular [ALLTEL or Sprint] may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber. Finally in the future, if a roaming partner believes that Cingular [ALLTEL or Sprint] is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act." See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd at 13093 ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127.

<sup>34</sup> Because the record was stale, the Commission terminated the then-pending automatic roaming NPRM proceeding, and initiated the current proceeding. See *Reexamination NPRM*, 20 FCC Rcd at 15055 ¶¶ 18-19.

<sup>35</sup> *Reexamination NPRM*, 20 FCC Rcd at 15048 at ¶ 1.

<sup>36</sup> *Id.* at 15058-59 ¶¶ 23-24, 27-32, 36.

<sup>37</sup> *Id.* at 15059 ¶ 36.

<sup>38</sup> See *infra* Appendix B.

<sup>39</sup> See expert economic analysis provided by Reply Comments of Harold W. Furchtgott-Roth on behalf of T-Mobile (Furchtgott-Roth/T-Mobile Reply Comments); Comments and Reply Comments of R. Preston McAfee on behalf of SouthernLINC (McAfee/SouthernLINC Comments and Reply Comments); ERS Group Comments on behalf of Leap (ERS Group/Leap Comments); Comments and Reply Comments of Gregory L. Rosston on behalf of Sprint Nextel (Rosston/Sprint Nextel Comments and Reply Comments); Thomas W. Hazlett Reply Comments on behalf of Cingular Reply Comments (Hazlett/Cingular Reply Comments); David S. Sibley on behalf of Leap Reply Comments (Sibley/Leap Reply Comments).

representative sample of wireless carriers roaming agreements on a confidential basis.<sup>40</sup> On May 5, 2006, Oppositions to the Joint Petition were filed by Cingular, Sprint/Nextel and Verizon Wireless.<sup>41</sup> On May 12, 2006, the Petitioners filed a Reply to Oppositions.<sup>42</sup>

### III. REPORT AND ORDER

18. In this Report and Order, we first find that automatic roaming is a common carrier obligation pursuant to Sections 201 and 202 of the Communications Act, and then discuss the scope of the automatic roaming obligation for CMRS carriers. We decline to regulate the automatic roaming rates, instead allowing the rates to be freely determined through negotiations between the carriers based on competitive market forces. Next, we address other issues raised by commenters in the record, including a request for “most favored” roaming partner rates for Tier IV CMRS carriers, in-market or home roaming issues, access to non-interconnected features and enhanced digital networks, and public filing of roaming rates. In addition, we codify the automatic roaming obligations into a rule, imposing an affirmative obligation to provide automatic roaming on CMRS carriers. We also deny the petition for investigation pursuant to Section 403 of the Act. Finally, we decline to sunset the manual roaming rule at this time.

#### A. AUTOMATIC ROAMING OBLIGATIONS

##### 1. Automatic Roaming

###### a. Background

19. In the *Reexamination NPRM*, the Commission initiated a new proceeding to reexamine the state of roaming in the CMRS marketplace and whether CMRS providers should be subject to roaming obligations.<sup>43</sup> Noting that there had been recent changes in technologies and mobile telephony markets, the Commission sought up-to-date information on automatic roaming that would enable the Commission to fully consider the question and reach an informed decision about whether to adopt an automatic roaming rule.<sup>44</sup> Particularly, the Commission was interested in the effects that the existing roaming environment has on U.S. consumers.<sup>45</sup> Interested parties were invited to discuss in detail whether, in the absence of an automatic roaming requirement, there have been any CMRS industry changes and trends that have positively or negatively affected the availability of roaming to consumers.<sup>46</sup> Commenters were also asked to address both the potential benefits of various regulatory options and the potential costs. In addition, the Commission invited commenters to provide economic analysis and data regarding the potential benefits and costs of imposing an automatic roaming rule.<sup>47</sup> Finally, the Commission requested generally that commenters submit comments on any issues they believed important for the Commission to consider as it determined whether the public interest would be service by placing an automatic roaming

<sup>40</sup> See Joint Petition for Commission Inquiry Pursuant to Section 403 of the Communications Act, WT Docket No. 05-265, (filed Apr. 25, 2006) (“Joint Petition”). See also *infra* Appendix B (list of Joint Section 403 Petitioners and commenters).

<sup>41</sup> See Cingular Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006; Sprint Nextel Opposition to Joint Petition for Section 403 Investigation, WT Docket No. 05-265, filed May 5, 2006; Verizon Wireless Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006.

<sup>42</sup> See Joint Petitioner’s Reply to Oppositions, WT Docket No. 05-265, filed May 12, 2006.

<sup>43</sup> See *Reexamination NPRM*, 20 FCC Rcd. at 15055 ¶ 20.

<sup>44</sup> See *id.* at 15057 ¶ 25.

<sup>45</sup> See *id.* at 15058 ¶ 27.

<sup>46</sup> See *id.* at 15057 ¶ 25.

<sup>47</sup> See *id.* at 15058 ¶ 28.



requirement on CMRS providers.<sup>48</sup>

20. In the *Reexamination NPRM*, the Commission suggested one possible automatic roaming rule would require, as a condition of license, CMRS providers to enter into roaming agreements with other such providers where technically compatible handsets are being used, under non-discriminatory rates, terms, and conditions.<sup>49</sup> The Commission sought comment on whether a non-discriminatory approach to automatic roaming is appropriate in the current marketplace, or whether any other approaches should be considered.<sup>50</sup> To the extent that a CMRS provider refuses to enter an automatic roaming agreement, the Commission also sought comment on the adequacy of remedies available under existing law, such as Sections 201, 202, 208, 251, and 332 of the Act.<sup>51</sup>

21. In response to the *Reexamination NPRM*, many smaller and regional carriers urge the Commission to adopt an automatic roaming rule and affirm that CMRS carriers have an affirmative obligation to provide roaming service to other carriers on a just, reasonable, and non-discriminatory basis.<sup>52</sup> Leap argues that the Commission should adopt rules in order to facilitate enforcement of the common carrier obligations and promote competition.<sup>53</sup> In addition, Centennial and other small carriers contend that the Commission should ensure that roaming rates are reasonable and guard against discrimination in the rates, terms and conditions under which roaming is provided by CMRS carriers.<sup>54</sup> RCA and SouthernLINC further argue that the Commission should require carriers to enter into good faith negotiation for automatic roaming.<sup>55</sup> Some of the commenters urge the Commission to adopt specific rules regarding carriers' roaming obligations, while others request only that the Commission provide general guidance regarding the nature of providers' roaming obligations and then leave it to marketplace to determine what constitutes "reasonable terms" under roaming agreements.<sup>56</sup> We also note that in its recent comments in another proceeding, the Navajo Nation argues that a better incentive for rural roaming must be established because, in rural areas such as Indian reservation lands, they contend

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<sup>48</sup> See *id.* at 15059 ¶ 31.

<sup>49</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15059-60 ¶ 33; *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9475 ¶ 22. This rule had been suggested in the *2000 CMRS NPRM*, *supra* n. 5, as well as in the *Interconnection and Resale Obligations Third NPRM*, *supra* n. 2.

<sup>50</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15059-60 ¶ 33.

<sup>51</sup> See *id.* at 15060 ¶ 34. A variety of parties in CC Docket No. 94-54 contended that existing remedies were sufficient. In CC Docket No. 94-54, see, e.g., Bell Atlantic Comments at 7-8 and RTG Comments at 4.

<sup>52</sup> See generally Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; Safety and Frequency Equity Competition Coalition (SAFE) Comments; NY3G Partnership (NY3G) Comments; Comments of Organization for the Promotion Advancement of Small Telecommunications Companies (RTG/OPASTCO), Alaska Native Broadband 1 License, LLC (ANB), Centennial, John Staurulakis, Inc. (JSI), Unicom, National Telecommunications Cooperative Association (NTCA), ACS Wireless, Inc. (ACS), AIRPEAK Communications, LLC and Airtel Wireless, LLC, Joint Comments (AIRPEAK/Airtel Joint Comments), North Dakota Network Company (NDNC), NTCA, RCA, Cleveland Unlimited, Inc. (Cleveland Unlimited), Punxsutawney Communications (Punxsutawney), Suncom Wireless (Suncom).

<sup>53</sup> Leap Reply Comments at 6.

<sup>54</sup> ANB Comments at 1-2; Centennial Reply Comments at 8-10; JSI Reply Comments at 1-2; Unicom Reply Comments at 1-2; and SAFE Comments at 3.

<sup>55</sup> See RCA Comments at 3-5; SouthernLINC Comments at 53-54.

<sup>56</sup> See, e.g., Centennial Comments at 11.

that often only a single service provider is available.<sup>57</sup> The Navajo Nation believes that mandatory roaming would result in more competitive pricing and services for consumers in these rural areas.<sup>58</sup>

22. In contrast, nationwide carriers and others oppose any automatic roaming regulation, arguing that automatic roaming agreements have proliferated without Commission action. They contend that allowing market forces to operate freely without regulation has resulted in low roaming rates and near nationwide coverage for many carriers.<sup>59</sup> Also, these commenters argue that a mandatory automatic roaming requirement would stifle the incentive for carriers to provide facilities-based coverage, innovative rate plans, and better quality services at lower costs.<sup>60</sup>

#### b. Discussion

23. We clarify that automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act. If a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it is desirable and serves the public interest for that CMRS carrier to provide automatic roaming service on reasonable and non-discriminatory terms and conditions.<sup>61</sup> As discussed below, services that are covered by the automatic roaming obligation are limited to real-time, two-way switched voice or data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. These findings are consistent with the Commission's previous determinations.<sup>62</sup>

<sup>57</sup> See Navajo Nation Telecommunications Regulatory Commission Comments filed in WT Docket No. 06-156, Biennial Regulatory Review – Amendments to Streamline and Harmonize Various Rules Affecting Wireless Radio Services: Wireless Telecommunications Bureau, Navajo Nation Telecommunications Regulatory Commission Comments at 5 (“Navajo Nation Streamlining Comments”).

<sup>58</sup> See Navajo Nation Streamlining Comments at 5. The Navajo Nation also argues that roaming should be universally mandated for services provided via a federally-subsidized telecom project, and there should be no charge for roaming services to customers utilizing services from these projects. See Navajo Nation Streamlining Comments at 5.

<sup>59</sup> See, e.g., Cingular Comments at 12-30; Cingular Reply Comments at 3-8; Nextel Partners Comments at 5-9; Sprint Nextel Comments at 17-21; Sprint Nextel Reply Comments at 9-11; T-Mobile Comments at 3-6; T-Mobile Reply Comments at 4-5; Verizon Wireless Comments at 17-21; Verizon Wireless Reply Comments at 20-24; Alltel Reply Comments at 1-2; Edge Reply Comments at 6-9.

<sup>60</sup> See, e.g., Cingular Comments at 22-25; Nextel Partners Comments at 6-9; Sprint Nextel Comments at 20; Alltel Reply Comments at 6-8.

<sup>61</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463 ¶ 2. Under Section 201(a) of the Act, common carriers must provide service “upon reasonable request,” and the Commission has authority to order interconnection among carriers if it finds it necessary or desirable in the public interest. See 47 U.S.C. § 201(a). Section 201(b) requires that all charges, practices, classifications, and regulations for common carrier service be just and reasonable and provides that any charge, practice, classification, and regulation that is unjust and unreasonable is unlawful. See 47 U.S.C. § 201(b). Section 202(a) prohibits unjust or unreasonable discrimination in charges, practices, classifications, and services by common carriers in connection with any “like” communications service and also prohibits undue or unreasonable preferences or advantages. See 47 U.S.C. § 202(a). Section 208 provides that complaints may be filed with the Commission against common carriers subject to the Act. See 47 U.S.C. § 208.

<sup>62</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10 and 9472 ¶ 16 (stating that roaming is a common carrier service and extending the application of manual roaming rule to certain CMRS carriers (cellular, broadband PCS and covered SMR) competing in the mass market for real-time, two-way voice services and to protect the subscribers of all carriers offering such services). See also *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463-71 ¶¶ 1-14.

24. Until our actions today, the Commission has not expressly addressed whether, under Sections 201 and 202 of the Act, it is desirable and necessary to provide automatic roaming upon reasonable request. Nor has it expressly stated that automatic roaming is a common carrier service. Moreover, it has not adopted an automatic roaming rule. As a result, the record before us demonstrates that it is not clear to some of the parties in this proceeding whether the provisioning of automatic roaming is a common carrier service or to what extent the requirements of Sections 201 and 202 of the Communications Act apply to automatic roaming.<sup>63</sup> In addition, commenters expressed differing views on the scope of carriers and spectrum bands to which any automatic roaming obligations may apply.<sup>64</sup> We address and clarify these matters in the discussion that follows.

25. As previously determined, roaming is a common carrier service, because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.<sup>65</sup> In finding that roaming is a common carrier service, the Commission noted the contrast between roaming and services such as billing and collection offered by local exchange carriers (LECs) and interexchange carriers (IXCs), which are not common carriage because they do "not allow customers of the service . . . to communicate or transmit intelligence of their own design and choosing," and because they can be offered by non-communications entities such as credit card companies.<sup>66</sup> The Commission also found that roaming satisfies all the statutory elements of commercial mobile radio service,<sup>67</sup> and "is thus a common carrier service, because it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public."<sup>68</sup> As explained earlier, there are two forms of roaming -- manual and automatic. We find that both forms of roaming are common carrier services because both forms of roaming capability give end users access to a foreign network in order to communicate messages of their own choosing.<sup>69</sup>

26. Further, under section 332 of the Communications Act, CMRS providers are subject to common carrier regulations. Section 332(c)(1)(A) provides that a "person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier,"<sup>70</sup> and subsection (c)(1)(B) states that, "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Title."<sup>71</sup> Like any other common carrier service offering, if a CMRS provider offers automatic roaming, it triggers its common

<sup>63</sup> See AIRPEAK/Airtel Joint Comments at 8; Centennial Comments at 11; Leap Comments at 17-18; MetroPCS Comments at 21; NY3G Comments at 4; SLO Cellular Comments at 2; SouthernLINC Comments at 24-25.

<sup>64</sup> See e.g., NY3G Partnership Comments at 3-5; SAFE Comments at 2-3.

<sup>65</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10.

<sup>66</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10 (citing *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, *Report and Order*, 102 FCC 2d 1150 (1986)).

<sup>67</sup> 47 U.S.C. § 332(d).

<sup>68</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10 n.30 (citing 47 U.S.C. § 332(d)(1)).

<sup>69</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10. We note that with manual roaming, the subscriber must establish a relationship directly with the host carrier on whose system he or she wants to roam in order to make a call. Automatic roaming, however, requires a pre-existing contractual agreement between the subscriber's home system and the host system. In other words, the request for automatic roaming has to be done by the subscriber's carrier on behalf of the subscriber to enable the subscriber to roam.

<sup>70</sup> 47 U.S.C. § 332(c)(1)(A).

<sup>71</sup> 47 U.S.C. § 332(c)(1)(B).

carrier obligations with respect to the provisioning of that service under the Communications Act. We determine that, if a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it is desirable and necessary to serve the public interest for that CMRS carrier to provide automatic roaming service on reasonable and non-discriminatory terms and conditions.<sup>72</sup>

27. The record demonstrates that automatic roaming is currently widespread due, in large part, to the offering of nationwide and regional calling plans.<sup>73</sup> As the Commission has previously noted, automatic roaming is far more convenient for a subscriber than manual roaming and, as a practice, has become increasingly widespread.<sup>74</sup> Today, most wireless customers expect to roam automatically on other carriers' networks when they are out of their home service area. Accordingly, we recognize that automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country, and reducing inconsistent coverage and service qualities.<sup>75</sup>

28. Given the current CMRS market situation and wireless customer expectations, we find it is in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers, particularly in rural areas.<sup>76</sup> In other words, in order to enable its subscribers to receive service seamlessly, a CMRS carrier may make an automatic roaming request on behalf of its subscribers. If the request is reasonable, then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier.<sup>77</sup> Many smaller and regional carriers -- many in rural areas -- urge the Commission to confirm that CMRS carriers have an obligation to provide automatic roaming services to other carriers for the benefit of their subscribers on a just, reasonable, and non-discriminatory basis.<sup>78</sup> We are mindful of the ongoing complaints by small, regional and rural carriers against the nationwide carriers that, under current market conditions, it is getting more difficult for small and rural carriers to obtain access to nationwide carriers' networks through automatic roaming agreements.<sup>79</sup> For example, RTG reports that "small rural carriers have experienced a spike in the cost for their customers to roam on the nationwide carriers' network and an increased unwillingness by the nationwide carriers to enter into roaming agreements or renew existing ones."<sup>80</sup> Both Airpeak and SouthernLINC also describe the

<sup>72</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463 ¶ 2.

<sup>73</sup> MetroPCS Comments at 21. See also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eleventh Report*, 21 FCC Rcd 10947 (2006) ("*Eleventh Report*").

<sup>74</sup> See *ALLTEL-WWC Order*, 20 FCC Rcd at 13090 ¶ 101.

<sup>75</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments in WT Docket No. 06-156 at 5.

<sup>76</sup> See 47 U.S.C. §§ 301, 303(c), 332.

<sup>77</sup> The obligation to provide automatic roaming is not reciprocal. Upon reasonable request, a host carrier is only required to provide automatic roaming to the subscribers of the requesting carrier. A reasonable request does not trigger any obligation for the host carrier to provide roaming for its own subscribers on the requesting carrier's network, or to negotiate a roaming agreement with the requesting carrier regarding such services.

<sup>78</sup> See generally, Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; SAFE Comments; NY3G Comments; RTG/OPASTCO Comments, ANB Comments, Centennial Comments, JSI Comments, Unicom Comments, NTCA Comments, ACS Comments, AIRPEAK/Airtel Joint Comments, NDNC Comments, NTCA Comments, RCA Comments, Cleveland Unlimited Comments, Punxsutawney Comments, Suncom Comments.

<sup>79</sup> See, e.g., RTG Comments at 10; Leap Reply Comments at 7; Airpeak Comments at 6-8; and SouthernLINC Comments at 11-15.

difficulties they have had obtaining roaming agreements from Sprint/Nextel and Nextel Partners.<sup>81</sup> Our clarification that automatic roaming, as a common carrier service, is subject to protections outlined in Sections 201 and 202 of the Communications Act takes into account these public interest concerns and ensures that, ultimately, subscribers receive automatic roaming on just, reasonable and non-discriminatory terms. We also note that this clarification will alleviate some of the general concerns about roaming and roaming practices in the CMRS market that were raised previously in the context of the Commission's review and consideration of several wireless mergers, including Cingular/AT&T Wireless, ALLTEL/Western Wireless, and Sprint/Nextel.<sup>82</sup>

29. Additionally, we determine that a reasonable request for automatic roaming will be limited to real-time, two-way switched voice or data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>83</sup> This ensures that all CMRS providers competing in the mass market for real-time, two-way voice and data services are similarly obligated to provide automatic roaming services, thereby equally benefiting all subscribers of mobile telephony services who seek to roam seamlessly over CMRS networks. We also conclude, as we have in prior proceedings, that an important indicator of a provider's ability to compete with other CMRS providers is whether the provider's system has "in-network" switching capability.<sup>84</sup> In-network switching facilities accommodate the reuse of frequencies in different portions of the same service area, thus enabling any CMRS provider to offer interconnected service to a larger group of customers and compete directly with other CMRS providers in the mass consumer market.<sup>85</sup>

30. *Complaint Procedures.* Based on our finding that automatic roaming is a common carrier service, we determine that the provisioning of automatic roaming service is subject to Section 208 which provides that complaints may be filed with the Commission against common carriers subject to the Communications Act.<sup>86</sup> As discussed above and noted in the record, there has been some confusion regarding whether the provisioning of automatic roaming services is subject to the requirements of

(Continued from previous page)

<sup>80</sup> See RTG Comments at 10; Leap Reply Comments at 7.

<sup>81</sup> See Airpeak Comments at 6-8; SouthernLINC Comments at 11-15.

<sup>82</sup> In approving the merger proposals and addressing concerns raised by smaller carriers, the Commission noted that "our manual roaming rule requires other carriers to complete calls initiated by Cingular's [ALLTEL's or Sprint's] customers where Cingular [ALLTEL or Sprint] cannot because it has neither its own signal nor an automatic agreement." See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13093 at ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127. In addition, to further ensure compliance, the Commission stated that "we adopt as a condition to our grant in this Order a reciprocal duty, i.e., that Cingular [ALLTEL or Sprint] may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber. Finally in the future, if a roaming partner believes that Cingular [ALLTEL or Sprint] is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act." See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13053 at ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127.

<sup>83</sup> See *infra* section III.B.3 (non-interconnected services discussion). See also 47 U.S.C. §§ 153 and 332.

<sup>84</sup> See *Interconnection and Resale Obligations MO&O*, 15 FCC Rcd at 15980 ¶ 15; *Telephone Number Portability Second Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21204, 21228-30 ¶¶ 52-57 (1998); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order*, 12 FCC Rcd 22665, 22703-04 ¶¶ 76-78.

<sup>85</sup> *Interconnection and Resale Obligations MO&O*, 15 FCC Rcd at 15980 ¶ 15.

<sup>86</sup> See 47 U.S.C. § 208.

Section 208.<sup>87</sup> Given the fact-specific nature of the roaming issues that have come to light during this proceeding and several merger proceedings, we conclude that many disputes involving automatic roaming services would be best resolved through an adjudicatory process.<sup>88</sup> In deciding roaming complaints, we will consider whether a request is reasonable or whether the activity complained of is unjust and unreasonable based on the totality of the circumstances of the case.<sup>89</sup> When roaming-related complaints are filed, we intend to address them expeditiously on a case-by-case basis.

31. Further, we note that the Accelerated Docket procedure, including pre-complaint mediation, is available to roaming complaints.<sup>90</sup> Several commenters – including parties both supporting and opposing adoption of an automatic roaming rule – requested use of the Commission’s Accelerated Docket procedures to resolve roaming complaints.<sup>91</sup> Although all roaming complaints will not automatically be placed on the Accelerated Docket, an affected carrier can seek consideration of its complaint under the Commission’s Accelerated Docket rules and procedures where appropriate.

32. Some commenters requested that the Commission amend the Accelerated Docket procedure rules such as giving Commission staff delegated authority to decide roaming proceedings on the Accelerated Docket.<sup>92</sup> We note that when the Commission adopted the Accelerated Docket rules, it stated that “[c]ertain categories of issues that arise in Accelerated Docket proceedings will properly be the

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<sup>87</sup> See AIRPEAK/Airtel Joint Comments at 8; Centennial Comments at 11; Leap Wireless Comments at 17-18; MetroPCS Comments at 21; NY3G Comments at 4; SLO Cellular Comments at 2; SouthernLINC Comments at 24-25.

<sup>88</sup> See, e.g., RCA Comments at 3-5 (calling for adoption of good-faith negotiation process similar to that required under SHVIA). Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues, *First Report and Order*, 15 FCC Rcd 5445, 5448 ¶ 6 (2000) (*SHVIA Order*) (stating, in the broadcast retransmission consent context, that a broadcaster could not refuse to negotiate, could not unreasonably delay a negotiation, and must offer considered reasons why it rejected an offer).

<sup>89</sup> See, e.g., *Orloff v. Vodafone Airtouch*, *Memorandum Opinion and Order*, 17 FCC Rcd 8987 (2002) (*Orloff*); *aff’d sub. nom., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (*Orloff Appeal*), *cert. denied*, 542 U.S. 937, 124 S.Ct. 2907, 159 L.Ed.2d 813 (2004). See also *Digital Cellular, Inc. Petition for Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the Central District of California*, *Memorandum Opinion and Order*, 20 FCC Rcd 8723 (2005).

<sup>90</sup> See 47 C.F.R. §§ 1.721-1.736. See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, *Order on Reconsideration*, 13 FCC Rcd 17018 (2001).

<sup>91</sup> For example, SouthernLINC recommends “automatic placement of all roaming complaints on the Enforcement Bureau’s Accelerated Docket in order to provide for a sufficiently timely resolution of the complaint.” SouthernLINC Comments at 51. See also T-Mobile Reply Comments at 9, n.40 (suggesting that the more efficient use of the Commission’s existing enforcement mechanisms, such as the Accelerated Docket procedures, rather than an automatic roaming requirement, would be appropriate in what may be highly fact-based disputes). See also ACS Comments at 3-4 (requesting that the Commission create a 90-day dispute resolution process for customers denied roaming and carriers unable to negotiate roaming agreements.)

<sup>92</sup> SouthernLINC and T-Mobile requested that the Commission adopt certain specific proposals to amend the Accelerated Docket procedures for roaming complaints, such as: delegating authority to staff to decide roaming proceedings on the Accelerated Docket; establishing a rebuttable presumption that roaming complaints are fast tracked; imposing a mandatory 21-day settlement; imposing expedited discovery of parties roaming agreements; and deciding roaming complaints within 90 days of receipt of complaint. SouthernLINC Ex Parte Letter, dated March 7, 2007, at 3; T-Mobile Ex Parte Letter, dated May 31, 2006 at 2-4; T-Mobile Reply Comments at 9. SouthernLINC also asked the Commission to reject some of the procedural amendments that T-Mobile requested. SouthernLINC Ex Parte Letter, dated March 7, 2007, at 4-11.

subject of delegated authority decisions by the Bureau. These issues will be those that fall outside of section 5(c)(1)<sup>93</sup> of the Act, and do not raise novel issues of law or policy.<sup>94</sup> We see no reason to adopt a different policy with regard to issues arising in a roaming complaint proceeding.

33. *Reasonableness of Automatic Roaming Requests.* In order to provide some guidance as to the reasonableness of automatic roaming requests under Sections 201(b) and 202(a), we also establish today several rebuttable presumptions with respect to requests for automatic roaming and the would-be host carriers' response. We will presume a request for automatic roaming to be reasonable, in the first instance, if the requesting CMRS carriers' network is technologically compatible and the roaming request is for areas outside of the requesting carrier's home market.<sup>95</sup> As noted above, to be deemed reasonable, a request for automatic roaming may involve only those real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>96</sup> When a presumptively reasonable automatic roaming request is made, a would-be host CMRS carrier has a duty to respond to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request. For example, following receipt of a reasonable automatic roaming request, evidence of a would-be host carrier's refusal to respond at all or a persistent pattern of stonewalling behavior will likely support a finding of a breach of the would-be host carrier's automatic roaming obligations.

34. The presumptions and examples of reasonableness cited above are not exhaustive, but rather are intended to provide some guidance to parties that may be participating in a section 208 complaint proceeding involving roaming services. CMRS carriers may argue that the Commission should consider other relevant factors in determining whether there is a violation of the automatic roaming obligations, based on the totality of the circumstances present in a particular case.

35. We reiterate that our general policy regarding CMRS services is to allow competitive market forces, rather than regulations, to promote the development of wireless services. On balance, taking into consideration the concerns raised in the record by certain CMRS carriers<sup>97</sup> and our preference for allowing competitive market forces to govern rate and rate structures for wireless services, we expressly decline to impose any corresponding rate regulation of automatic roaming services as discussed more fully below. With our finding that automatic roaming is a common carrier service subject to protections in Section 201 and 202 of the Communications Act and the rebuttable presumptions we described above, we have confidence that our clarification, in conjunction with competitive market forces, will continue to foster the development of seamless automatic roaming services for all CMRS subscribers in the nation, and continue to result in a variety of just and reasonable pricing plans and service offerings.

## **2. Determination Not to Impose Rate Regulation on Roaming Agreements**

### **a. Background.**

36. In response to the *Reexamination NPRM*, some of the commenters supporting adoption of

<sup>93</sup> 47 U.S.C. 155(c)(1).

<sup>94</sup> Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, *Second Report and Order*, 13 FCC Rcd 17018, 17070 ¶ 100 (1998) (citations omitted).

<sup>95</sup> See *infra* Section III.B.2 (in-market or home roaming discussion).

<sup>96</sup> See *infra* Section III.B.3 (non-interconnected services discussion). See also 47 U.S.C. §§ 153 and 332; 47 C.F.R. § 20.3.

<sup>97</sup> See, e.g., Cingular Comments at i, 18-30; NDNC Comments at 3; Nextel Partners Comments at 5-6.

automatic roaming obligations also request that the Commission cap the rates that a carrier may charge other carriers for automatic roaming service based on some benchmark of retail rates.<sup>98</sup> Some of these commenters have also submitted economic analyses in support of their proposals.<sup>99</sup> Other commenters oppose any rate regulation and, in turn, have submitted their own economic analyses disputing the theory and evidence used to justify the imposition of rate regulation.<sup>100</sup>

**b. Discussion.**

37. We decline to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier's customer roams on another carrier's network. In particular, we are not persuaded that consumers would be harmed in the absence of a price cap or some other form of rate regulation. We believe that the better course, as established in this Report and Order, is that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.

38. We find that there is insufficient evidence to justify regulating the roaming rates of carriers, and that any harm to consumers in the absence of affirmative regulation in this regard is speculative. Moreover, with the clarifications we make herein with respect to automatic roaming, we find that consumers are protected from being harmed by the level and structure of roaming rates negotiated between carriers. Absent a finding that the existing level and structure of roaming rates harm consumers, regulation of rates for automatic roaming service is not warranted. Because we are not persuaded that the existing level and structure of roaming rates negotiated between carriers harm consumers of mobile telephony services, we do not need to address the argument that the state of competition in the intermediate product market is such as to warrant rate regulation.

39. Based on the foregoing considerations, we conclude that regulation of roaming rates is not warranted on economic grounds. In addition, however, we agree with concerns raised in the record that rate regulation has the potential to distort carriers' incentives and behavior with regard to pricing and investment in network buildout.<sup>101</sup> Capping roaming rates by tying them to a benchmark based on larger carriers' retail rates may diminish larger carriers' incentives to lower retail prices paid by their customers, and perhaps even give them an incentive to raise retail rates. At the same time, by requiring larger carriers to offer national roaming coverage to their competitors' customers at nearly the same rates

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<sup>98</sup> See Leap Comments at 17, 19-20 (recommending that, in geographic areas where there are three or fewer facilities-based carriers from which the carrier seeking automatic roaming service could obtain such service, the Commission prohibit a facilities-based carrier from charging rates for automatic roaming that exceed the carrier's average retail revenue per minute for that area). See also SouthernLINC Comments at 49 (proposing that the Commission establish a presumption that a carrier's roaming rates in a region are unreasonable if they exceed the lowest prevailing per-minute retail rates that it charges its own subscribers in that region).

<sup>99</sup> See, e.g., Leap Comments, Attachment A (ERS Group, *Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Services: An Economic Analysis*); SouthernLINC Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets*); SouthernLINC Reply Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets: Reply Comments*); Leap Reply Comments, Attachment A (David S. Sibley, *The Existence of Regional, Technology-Specific Wholesale Antitrust Markets for Roaming Services*); Leap Reply Comments, Attachment B (ERS Group, *A Further Analysis of the Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service*).

<sup>100</sup> See, e.g., Rosston/Sprint Nextel Comments; Rosston/Sprint Nextel Reply Comments; Hazlett/Cingular Reply Comments; Furchtgott-Roth/T-Mobile Reply Comments.

<sup>101</sup> See, e.g., Rosston/Sprint Nextel Comments at 3, 17, 19-21, 28, 30; Hazlett/Cingular Reply Comments at 9-10, 19; T-Mobile Reply Comments at 15-17; Rosston/Sprint Nextel Reply Comments at 13-14.



offered to their own customers, this form of rate regulation may also give smaller regional carriers an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans, thereby driving up the prices regional subscribers pay for calls within their plan's calling area.

40. Similarly, regulation to reduce roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network, rate regulation would tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks, rate regulation would impair larger carriers' incentives to expand, maintain, and upgrade their existing networks.<sup>102</sup>

## B. OTHER ISSUES

41. The following discussion addresses other issues related to automatic roaming raised by commenters in the record, including: "most favored" roaming partner rates for Tier IV CMRS carriers, in-market or home roaming issues, access to non-interconnected features and enhanced digital networks, and public filing of roaming rates.

### 1. "Most Favored" Roaming Partner Rates for Tier IV CMRS Providers

42. *Background.* Rural Telecommunications Group (RTG) and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)<sup>103</sup> ask the Commission to create a Tier IV category of CMRS providers that have fewer than 100,000 customers, and state that the Commission should require large, nationwide carriers to offer the same reasonable roaming arrangements to Tier IV providers as they offer to their "most favored" roaming partners.<sup>104</sup> RTG argues that this measure is necessary as a check against the abuse of power in the roaming services market by large providers.<sup>105</sup> Regional as well as national CMRS providers oppose this request. They argue that such an approach would improperly establish disparate regulatory treatment of CMRS providers by imposing an arbitrary limit on the number of customers a provider services.<sup>106</sup>

43. *Discussion.* Since our determination that automatic roaming is common carrier service

<sup>102</sup> We note that supporters of rate regulation argue that a price cap based on a benchmark of retail rates (RPM) would not discourage nationwide carriers from building out their networks or otherwise impede their ability to provide mobile services. This is because the price cap does not deduct for the costs of customer acquisition, billing and customer care that carriers do not incur when selling automatic roaming services to other carriers and, therefore, would leave nationwide carriers with a considerably higher profit margin for providing intercarrier roaming services than they obtain from retail sales. See Leap Comments, Attachment A at 18. We concur with commenters that argue that this methodology is flawed. See Hazlett/Cingular Reply Comments at 9-10, 19-20.

<sup>103</sup> RTG asserts that it is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. OPASTCO claims that it is a national trade association representing over 550 small telecommunications carriers serving rural areas of the United States. It also states that All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37) and that more than half of OPASTCO members provide some form of wireless service. RTG and OPASTCO Joint Reply Comments at 1 n.1.

<sup>104</sup> See RTG and OPASTCO Joint Comments at 3-4 and 14-15.

<sup>105</sup> See Notice of *Ex Parte* Presentation by Bennet & Bennet on behalf of RTG, June 28, 2005, WT Docket No. 00-193.

<sup>106</sup> See Verizon Wireless Comments at 16-19; SouthernLINC Comments at 42; T-Mobile Reply Comments at 24; U.S. Cellular (USCC) Reply Comments at 19.

applies to all CMRS providers regardless of size, we decline to adopt RTG and OPASTCO's request to create a special Tier IV category for roaming services. We also decline to adopt a rule requiring that large nationwide carriers offer the same roaming arrangements to Tier IV providers as they offer to their "most favored" roaming partners.

44. Because the need for automatic roaming services may not always be the same, and the value of roaming services may vary across different geographic markets due to differences in population and other factors affecting the supply and demand for roaming services, it is likely that automatic roaming rates will reasonably vary.<sup>107</sup> As discussed earlier, mobile services in the United States are differentiated based on price, as well as non-price attributes, including geographic coverage. Competition between mobile telephone pricing plans that are differentiated in these ways benefits consumers by allowing them to choose pricing plans that offer the best deal on the types of services they use most frequently.<sup>108</sup> Mandating that a subcategory of CMRS carriers (*i.e.*, Tier IV providers) are entitled to the same rates as "most favored" roaming partners and imposing this obligation on certain large CMRS carriers, without a clear demonstration of why such a requirement would serve the public interest, would distort competitive market conditions, resulting in unjust and unreasonable practices and discriminatory treatments.

45. Accordingly, we decline to mandate that a subcategory of CMRS carriers (*i.e.*, Tier IV providers) be entitled to the same rates as "most favored" roaming partners. We similarly decline to impose such an obligation on only certain larger CMRS carriers. Instead, we believe that our finding that automatic roaming rule is a common carrier service subject to provisions of Sections 201, 202 and 208 of the Communications Act and guidance as to rebuttable presumptions establishing the reasonableness of an automatic roaming request provide small CMRS carriers with an effective mechanism for recourse against unjust and unreasonable practices.

## 2. In-Market or Home Roaming

46. *Background:* In the *Reexamination NPRM*, the Commission sought comment on whether a carrier should be required to enter into an automatic roaming arrangement on a nondiscriminatory basis with a facilities-based competitor in the same market.<sup>109</sup> The Commission asked if such a requirement would diminish carriers' incentives for building out their networks and how an exception to an automatic roaming obligation that permits carriers to deny roaming agreements to in-market competitors could be administered, given the different geographic scope of wireless licenses.<sup>110</sup>

47. Verizon Wireless argues that a home roaming requirement would remove incentives for carriers to build out their own networks and would eliminate network quality, reliability and coverage as facets of wireless competition.<sup>111</sup> MetroPCS and SouthernLINC assert, however, that it defies logic that carriers would use in-market roaming in lieu of building out because such behavior would either reduce profits or increase consumer prices.<sup>112</sup> Leap Wireless states that carriers should not be permitted to invoke in-market justifications to refuse automatic roaming agreements, especially in areas where regional carriers have no facilities.<sup>113</sup> AIRPEAK and Airtel indicate that the technical complexities of in-

<sup>107</sup> See Sprint Comments, Rosston Declaration at 26-28.

<sup>108</sup> See roaming rate regulation discussion *supra* at Section III.A.

<sup>109</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15060 ¶ 35.

<sup>110</sup> See *id.*

<sup>111</sup> See Verizon Wireless Comments at 17-18; Verizon Wireless Reply Comments at 20.

<sup>112</sup> See MetroPCS Comments at 29; SouthernLINC Reply Comments at 41.

<sup>113</sup> See Leap Wireless Comments at 15-16.

market roaming are challenging and, as a result, they do not seek such a requirement.<sup>114</sup>

48. *Discussion:* We determine that our automatic roaming obligation does not include an in-market or home roaming requirement. We are not requiring a CMRS carrier to provide automatic roaming to a requesting CMRS carrier in a market where the CMRS carrier directly competes with the requesting CMRS carrier. Specifically, a CMRS carrier is not required to provide automatic roaming to a requesting CMRS carrier where the requesting CMRS carrier holds a wireless license or spectrum usage rights (e.g., spectrum leases) in the same geographic location as the would-be host CMRS carrier. In geographic areas outside of these overlapping areas or markets, however, a host carrier must comply with our automatic roaming requirement and provide this service in a manner consistent with the common carrier obligations of Sections 201 and 202 of the Communications Act.<sup>115</sup>

49. Contrary to certain carriers' contentions,<sup>116</sup> we find that an automatic roaming request in the home area of a requesting CMRS carrier, the area where the requesting CMRS carrier has the spectrum to compete directly with the would-be host carrier, does not serve our public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area. We agree with Cingular that, if a carrier is allowed to "piggy-back" on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage.<sup>117</sup> If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so. Consequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage. In other words, we believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality, reliability and coverage. This conclusion, however, should not be construed as prohibiting a requesting carrier from seeking to negotiate a roaming agreement including such terms if desired, or a host carrier from providing a requesting CMRS carrier with in-market or home roaming should it chose to do so. We continue to encourage all CMRS carriers to negotiate desired terms and conditions of automatic roaming agreements, including automatic roaming in overlapping geographic markets.

50. For purposes of this exclusion from automatic roaming obligations, in-market or home roaming is defined as any geographic location where the would-be host carrier and the requesting CMRS carrier have wireless licenses or spectrum usage rights that could be used to provide CMRS that cover or overlap the same geographic location(s).<sup>118</sup> Within these overlapping geographic areas, the would-be host carrier is not required to comply with an automatic roaming request.<sup>119</sup> This in-market or home roaming

<sup>114</sup> See AIRPEAK/Airtel Joint Comments at 9.

<sup>115</sup> 47 U.S.C. §§ 201, 202.

<sup>116</sup> See Leap Wireless Comments at 15; MetroPCS Comments at 29-30; SouthernLINC Reply Comments at 28, 41.

<sup>117</sup> See Cingular Comments at 26. See also Verizon Wireless Comments at 17-18.

<sup>118</sup> The overlapping geographic areas are excluded if the licenses and/or spectrum usage rights are, for example, in the cellular, covered SMR, PCS, 700 MHz or AWS bands.

<sup>119</sup> For example, if the requesting carrier has a wireless license that is based on a Metropolitan Statistical Area (MSA) and the would-be host carrier has a wireless license that is based on an Economic Area (EA) and the geographic location of the requesting carrier's MSA is within the host carrier's EA, then the would-be host carrier is not required by our automatic roaming requirement to provide such service within the geographic location of the requesting carrier's MSA. With regard to the areas outside of the requesting carrier's MSA that fall within the host carrier's EA, however, the host carrier must provide automatic roaming in a manner that is consistent with the common carrier provisions of Sections 201 and 202 of the Communications Act.

exclusion does not depend on the level of service the requesting CMRS carrier is providing in the overlapping geographic area. The exclusion applies regardless of whether the requesting CMRS carrier is providing no service, limited service, or state-of-the-art service.

51. Finally, we also determine that the automatic roaming obligation under Sections 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations.<sup>120</sup> CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.<sup>121</sup> We note that the Commission's mandatory resale rule was sunset in 2002,<sup>122</sup> and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.<sup>123</sup>

### 3. Access to Certain Data Features and Enhanced Digital Networks

#### a. Access to push-to-talk, text messaging (SMS) and non-interconnected data features

52. *Background.* In the *Reexamination NPRM*, the Commission sought comment on access to push-to-talk, dispatch, or other data roaming.<sup>124</sup> The Commission asked whether an automatic roaming rule should require carriers to permit roaming access to all technical features of their systems, and/or require carriers to make the same features accessible to all of their roaming partners.<sup>125</sup> The Commission stated that this issue initially was raised by SouthernLINC in the proceeding addressing the Sprint-Nextel merger, and invited comments on this issue, including information on how common practices (such as those alleged by SouthernLINC) are within the industry.<sup>126</sup>

53. In response to the *Reexamination NPRM*, SouthernLINC, AIRPEAK, and Airtel argue that data services should be included as part of an automatic roaming obligation because demand for data services is growing and its inclusion advances "ubiquitous access to mobile services."<sup>127</sup> SouthernLINC adds that there is a "market failure" because Sprint Nextel, the only nationwide iDEN-based service provider, will not provide data roaming access to SouthernLINC customers, but does provide such roaming services for customers of foreign iDEN carriers.<sup>128</sup> SouthernLINC contends that push-to-talk is highly valued by subscribers because it enables subscribers to establish private conferences on a one-to-

<sup>120</sup> Resale has been described by the Commission as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without adding value) for profit." Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, *Report & Order*, 60 FCC 2d 261, 271 ¶ 17 (1976), *aff'd on recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, *AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

<sup>121</sup> See Cingular Comments at 8.

<sup>122</sup> The CMRS Resale Rule expired at the close of November 24, 2002 pursuant to the sunset provision of the rule. 47 C.F.R. § 20.12(b) (1998).

<sup>123</sup> See 47 C.F.R. § 20.12; Sprint Nextel Comments at 19.

<sup>124</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15060-61.

<sup>125</sup> See *id.* at 15060-61.

<sup>126</sup> See *id.*

<sup>127</sup> See SouthernLINC Comments at 13, 18, 48-49; SouthernLINC Reply Comments at 7, 41; AIRPEAK/Airtel Joint Comments at 7.

<sup>128</sup> See SouthernLINC Comments at 12-15.

one or one-to-many basis using a single handset that can be used for phone, paging, and wireless data services.<sup>129</sup> Sprint Nextel and Nextel Partners oppose adoption of an automatic roaming rule and maintain that they should not be obliged to assist a competitor.<sup>130</sup> They claim that to do so would be to relinquish competitive advantages that they have earned through legitimate business decisions and capital investment to differentiate their service.<sup>131</sup> Further, Sprint Nextel argues that push-to-talk roaming necessitates costly changes to the network and would be difficult to implement and maintain.<sup>132</sup>

54. *Discussion.* As discussed above, the scope of automatic roaming services includes only services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables providers to reuse frequencies and accomplish seamless hand-offs of subscriber calls. As discussed below, we find that it would serve the public interest to extend automatic roaming obligations to push-to-talk<sup>133</sup> and SMS. We decline at this time, however, to adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services' definition, such as non-interconnected services or features.<sup>134</sup>

55. With respect to push-to-talk and SMS, we note that such offerings are typically bundled as a feature on the handset with other CMRS services, such as real-time, two-way switched mobile voice or data, that are interconnected with the public switched network.<sup>135</sup> Provision of these features differs from one carrier to another, *i.e.*, push-to-talk and SMS are interconnected features or services in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers. We are also aware that consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services, and expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas. For these reasons, we find that it is in the public interest to impose an automatic roaming obligation on push-to-talk and SMS offerings, subject to several provisos. Namely, the requesting carrier must offer push-to-talk and SMS to its subscribers on its own home network;<sup>136</sup> push-to-talk and SMS roaming must be technically feasible; and any changes to the would-be host carrier's network that are necessary to accommodate push-to-talk and SMS roaming requests must be economically reasonable.

56. With respect to non-interconnected features or services,<sup>137</sup> we find that the record in this proceeding lacks a clear showing that it is in the public interest at this time to impose an automatic roaming obligation. While proponents of unrestricted data roaming have argued that requiring roaming access to the non-interconnected features of a competitor's network would benefit consumers by providing greater availability for data features that are increasingly used by consumers, opponents are

<sup>129</sup> See SouthernLINC Comments, Attachment A at 7.

<sup>130</sup> See Sprint Nextel Comments at 2-4 and 17-21; Nextel Partners Reply Comments at 1-3.

<sup>131</sup> See Sprint Nextel Comments at 17-21; Nextel Partners Reply Comments at 3.

<sup>132</sup> See Sprint Nextel Reply Comments at 16-17.

<sup>133</sup> We note that some cellular and broadband PCS carriers offer push-to-talk functionality via the public switched network. See *e.g.*, *Eleventh Report*, at 10973; *Sprint Nextel Order*, 20 FCC Rcd at 13987-13989 ¶¶ 46-50.

<sup>134</sup> We note that nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS or other data features/services.

<sup>135</sup> See, *e.g.*, *Sprint Nextel Order*, 20 FCC Rcd at 13987 ¶ 46. See also SouthernLINC Comments at 52.

<sup>136</sup> See, *e.g.*, SouthernLINC Reply Comments at 30.

<sup>137</sup> See *infra* Section III.B.4.b.

concerned that it might undercut incentives to differentiate products and could chill innovation.<sup>138</sup> These opponents claim that extending roaming to non-interconnected features of a competitors' network may also adversely affect business decisions to build out facilities for facilities-based competition and reduce the incentives to access the spectrum through other means such as initial spectrum licensing or secondary markets. In light of these diverse views, we believe it is in the public interest, however, to examine the issue of automatic roaming for non-interconnected features or services through a Further Notice of Proposed Rulemaking, which is included in this item.<sup>139</sup>

**b. Access to Enhanced Digital Networks**

57. *Background.* In the *Reexamination NPRM*, the Commission stated that until recently, carriers' networks consisted primarily of second generation or "2G" digital technology, which provided voice and limited data service.<sup>140</sup> The Commission asked, if the Commission were to apply some form of automatic roaming requirement to 2G systems, whether that requirement should also apply to upgraded enhanced digital networks, such as 2.5G or 3G systems.<sup>141</sup> Recognizing that a competitive marketplace ordinarily encourages providers to invest capital to upgrade their networks, bringing the most modern services to their customers, the Commission asked, *inter alia*, what impact an automatic roaming requirement would have on the incentive of CMRS providers to invest in such upgrades.<sup>142</sup>

58. Most parties who participated in the roaming proceeding do not directly address automatic roaming on upgraded enhanced digital networks. Of those commenters who addressed data roaming services, the majority oppose extending automatic roaming to data services using enhanced digital networks.<sup>143</sup>

59. A few CMRS providers, however, requested that the Commission require automatic roaming for all services, including non-interconnected data services provided over enhanced digital networks.<sup>144</sup> ACS and MetroPCS contend that an automatic roaming requirement should apply to all enhanced data services, including services using EV-DO technology.<sup>145</sup> Of these two entities, however, only ACS asserts that it has deployed an EV-DO network capable of delivering mobile wireless broadband Internet

<sup>138</sup> Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>139</sup> See e.g., Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25; EDGE Reply Comments at 8-9; NDNC Comments at 3.

<sup>140</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15063 ¶ 44.

<sup>141</sup> The Commission stated that, in addition to providing more voice calling capacity, such enhanced digital networks "enable carriers to provide various services, such as text messaging, Internet downloads, video transmissions, and e-mail communications. GSM carriers are upgrading their networks to include General Packet Radio Services (GPRS) and Enhanced Data Rates for GSM Evolution (EDGE) technologies, and CDMA carriers are upgrading their networks to include CDMA2000 1xRTT technology. In the future, GSM carriers will employ Wideband CDMA, and CDMA carriers will employ Evolution Data Only (EV-DO) and Evolution-Data and Voice (EV-DV) systems to provide even greater enhancements to their networks." See *Reexamination NPRM*, 20 FCC Rcd at 15063 n.95.

<sup>142</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15063 ¶ 45.

<sup>143</sup> See ALLTEL Reply Comments at 8; Cingular Reply Comments at 3 & n.8; EDGE Reply Comments at 8-9; Nextel Partners Comments at 12; Sprint Reply Comments at 19-20; T-Mobile Comments at 16; T-Mobile Reply Comments at 14; Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>144</sup> See ACS Comments at 6; MetroPCS Comments at 25 n.58.

<sup>145</sup> See *id.*

access services.<sup>146</sup> ACS contends that it has not been able to enter into an automatic roaming agreement with national providers who have also developed EV-DO networks.<sup>147</sup> According to ACS, this is due to a lack of market driven incentives sufficient to encourage comprehensive provision of wireless enhanced data services.<sup>148</sup> EDGE, a small provider with fewer than 150,000 subscribers, requests that the Commission continue to abstain from imposing automatic roaming rules for enhanced data services using EDGE and GPRS technologies.<sup>149</sup> EDGE argues that forced roaming would thwart market forces by benefiting only those providers that have opted to invest less on their systems.<sup>150</sup>

60. *Discussion.* As we explained earlier in this Report and Order, the automatic roaming obligation applies to real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables providers to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>151</sup> As discussed above with respect to non-interconnected services, we similarly decline at this time to extend the scope of the automatic roaming services definition to include non-interconnected services provided over enhanced digital networks, such as wireless broadband Internet access. We find that automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services or to other wireless services that are not CMRS.<sup>152</sup> While we find that, based on the current record, it is premature to impose any roaming obligation regarding enhanced data services that are not CMRS and not interconnected to the public switched network, we will examine this matter further in the Further Notice of Proposed Rulemaking included in this item.

#### 4. Public Filing of Roaming Rates

61. *Background.* In its comments, MetroPCS requests that the Commission require the public filing of roaming agreements. It notes that current remedies are inadequate due to the lack of any publicly-available information concerning the terms and conditions under which national CMRS carriers offer roaming to each other, their respective affiliates, or unaffiliated carriers.<sup>153</sup>

62. *Discussion.* We decline to impose an affirmative obligation on CMRS carriers to post their roaming rates. As is generally the case with commercial agreements, roaming agreements are confidential and filing them would impose administrative costs on the carriers.<sup>154</sup> In light of our adoption of an automatic roaming rule as discussed below, we find that the available remedies for redress are

<sup>146</sup> See ACS Comments at 4.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See EDGE Reply Comments at 1, 8.

<sup>150</sup> See *id.* at 9; see also, NDNC Comments at 3 (arguing against automating roaming rules because they create a disincentive for companies to further develop their networks).

<sup>151</sup> See *supra* ¶ 1.

<sup>152</sup> See *Wireless Broadband Internet Access Declaratory Ruling*, 22 FCC Rcd at 5906 ¶¶ 11-12.

<sup>153</sup> See Metro PCS Comments at 26-27; Cleveland Unlimited Reply Comments at 8 (agreeing with Metro PCS that roaming agreements should be made public). See also Metro PCS *Ex Parte* dated February 7, 2006 wherein it requested that the Commission compel all carriers large and small to provide complete information regarding their existing roaming arrangements and roaming policies. However, SouthernLINC argued that the Commission should not require the posting of all the roaming agreements, indicating that the Commission and other parties should rely on the "publicly available information." SouthernLINC Reply Comments at 18.

<sup>154</sup> See Implementation of Section 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd 1411, 1478-1480 ¶¶ 175-179 (1994) (*CMRS Second Report and Order*).

sufficient to address disputes that may arise. Therefore, we need not burden CMRS carriers by requiring them to file roaming agreements. Furthermore, disclosure of roaming agreements would enable CMRS carriers to ascertain competitors' prices which could encourage carriers to maintain artificially high rates.<sup>155</sup> In a market where competition disciplines the rates, creating transparency in rates may have the effect of restricting competition and raising rates above competitive levels.<sup>156</sup> Therefore, we do not find that the public interest would be served by requiring CMRS carriers to disclose their agreements or to undertake the costs required to make them public.

### C. CODIFICATION OF AUTOMATIC ROAMING OBLIGATIONS

63. In this Report and Order, we codify the CMRS carriers' automatic roaming obligation into a rule requiring that CMRS carriers provide automatic roaming to any requesting technologically compatible CMRS carrier outside of the requesting carrier's home market on reasonable and nondiscriminatory terms and conditions. Based on the record before us, we determine that, similar to the manual roaming rule, it would serve the public interest to codify an automatic roaming rule imposing an affirmative obligation to provide automatic roaming on CMRS carriers that offer real-time, two-way switched voice or data service over digital network that is interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. This ruling is based on our recognition that automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country and reducing inconsistent coverage and service qualities.<sup>157</sup>

64. Codification of this requirement is also particularly relevant for rural areas.<sup>158</sup> Many smaller and regional CMRS carriers urge the Commission to adopt an automatic roaming rule, confirming that CMRS carriers have an affirmative obligation to provide automatic roaming service to other CMRS carriers on a just, reasonable, and non-discriminatory basis.<sup>159</sup>

65. The record reflects a number of ongoing complaints by small, regional and rural CMRS carriers against the nationwide CMRS carriers. These small and rural carriers assert that under current market conditions, it is getting more difficult for them to obtain access to nationwide carriers' networks through automatic roaming agreements. For example, RTG reports that "small rural carriers have experienced a spike in the cost for their customers to roam on the nationwide carriers' network and an increased unwillingness by the nationwide carriers to enter into roaming agreements or renew existing

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<sup>155</sup> See *CMRS Second Report and Order*, 9 FCC Rcd 1478-1480 ¶¶ 175-179 (declining to impose tariffs on CMRS carriers, in part, because it would allow carriers to maintain artificially high rates); see also, Department of Justice/Federal Trade Commission Merger Guidelines § 2.1 (the amount of information available to companies could be relevant to the companies' abilities to engage in anticompetitive behavior).

<sup>156</sup> See *id.*

<sup>157</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments at 5 in WT Docket No. 06-156.

<sup>158</sup> See 47 U.S.C. §§ 301, 303(c), 332.

<sup>159</sup> See generally Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; Safety and Frequency Equity Competition Coalition (SAFE) Comments; NY3G Partnership (NY3G) Comments; Comments of Organization for the Promotion Advancement of Small Telecommunications Companies (RTG/OPASTCO), Alaska Native Broadband 1 License, LLC (ANB), Centennial, John Staurulakis, Inc. (JSI), Unicom, National Telecommunications Cooperative Association (NTCA), ACS Wireless, Inc. (ACS), AIRPEAK Communications, LLC and Airtel Wireless, LLC, Joint Comments (AIRPEAK/Airtel Joint Comments), North Dakota Network Company (NDNC), NTCA, RCA, Cleveland Unlimited, Inc. (Cleveland Unlimited), Punxsutawney Communications (Punxsutawney), Suncom Wireless (Suncom).



ones.”<sup>160</sup> Both Airpeak and SouthernLINC also describe the difficulties they have had obtaining roaming agreements from Sprint/Nextel and Nextel Partners.<sup>161</sup>

66. We codify the automatic roaming obligations of CMRS carriers into a rule requiring that they provide automatic roaming to any requesting technologically compatible CMRS carrier outside of the requesting CMRS carrier’s home market on reasonable and nondiscriminatory terms and conditions.<sup>162</sup> This rule applies to CMRS carriers that offer real-time, two-way switched voice or data service over digital network that is interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. We also note that codification of an automatic roaming obligation gives CMRS carriers another avenue to redress roaming disputes, benefiting mobile telephony subscribers.

67. Finally, we clarify that automatic roaming, pursuant to Sections 201 and 202, as a common carrier obligation applies to CMRS carriers’ analog networks. We do not find, however, that it is necessary to codify this obligation into a specific rule. With the sunset of the analog service requirement on February 18, 2008, there would be little benefit to a codified automatic roaming rule for analog networks that might potentially apply between now and that date.<sup>163</sup> Individual carriers may, of course, enter into automatic roaming agreements for their analog networks, and any allegations that particular practices on analog networks are unjust, unreasonable or otherwise in violation of Sections 201 and 202 of the Communications Act would be subject to the complaint process of Section 208 of the Communications Act.

#### **D. PETITION FOR INVESTIGATION PURSUANT TO SECTION 403 OF THE ACT**

68. On April 25, 2006, pursuant to Section 403 of the Act,<sup>164</sup> AIRPEAK, Airtel, Cleveland Unlimited, Leap Wireless, MetroPCS, Punxsutawney, RTG, and SouthernLINC filed a joint petition that asks the Commission to initiate an inquiry for the purpose of gathering and inspecting a representative sample of wireless carrier roaming agreements on a confidential basis.<sup>165</sup> On May 5, 2006, Oppositions to

<sup>160</sup> RTG Comments at 10; Leap Reply Comments at 7.

<sup>161</sup> See Airpeak Comments at 6-8; SouthernLINC Comments at 11-15.

<sup>162</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments at 5 in WT Docket No. 06-156.

<sup>163</sup> In 2002, the Commission found that it was in the public interest to no longer require carriers to continue to provide analog service after February 18, 2008. See Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, WT Docket No. 01-108, 18 FCC Rcd 490 ¶ 22 (2002) (“2000 Biennial Review R & O”). See also 47 C.F.R. § 22.901(b) and Sunset of the Cellular Radiotelephone Service Analog Service Requirement and Related Matters, RM No. 11355, *Memorandum Opinion and Order*, FCC 07-103 (rel. June 15, 2007) (denying an alarm industry petition seeking a two-year extension of the February 18, 2008 sunset of the cellular licensee analog service requirement).

<sup>164</sup> Section 403 of the Communications Act provides, in pertinent part, that “[t]he Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing . . . under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.” See 47 U.S.C. § 403. Consistent with this statutory language, the Commission has held that it has broad discretion whether to institute a Section 403 inquiry. See *In the Matter of James A. Kay, Jr.*, *Memorandum Opinion & Order*, 13 FCC Rcd 16369, 16373 ¶ 10 (1998).

<sup>165</sup> See Joint Petition.

the Joint Petition were filed by Cingular, Sprint/Nextel and Verizon Wireless.<sup>166</sup> On May 12, 2006, the Petitioners filed a Reply to Oppositions.<sup>167</sup> In light of our adoption of an automatic roaming rule today and related clarifications, we deny the Joint Petition.

69. *Background.* The parties who filed the Joint Petition request that the Commission impose an automatic roaming requirement.<sup>168</sup> Petitioners argue that there is a sharp disagreement between the large national providers and smaller local and regional providers as to whether roaming services are being made available on reasonable non-discriminatory terms.<sup>169</sup> Petitioners reason that the "best evidence" to resolve this dispute is to review a representative sample of the actual roaming agreements.<sup>170</sup> To that end, they request that the Commission require that carriers file these agreements with the Commission for review and inspection.

70. Cingular, Sprint/Nextel and Verizon Wireless oppose the Joint Petition. They make the following arguments: the record in the proceeding is sufficient for the Commission to decide whether an automatic roaming rule is necessary;<sup>171</sup> without a comprehensive review of the facts of the circumstances leading to the terms of the roaming agreements, a review of the roaming agreements alone does not conclusively establish whether the terms were reasonable;<sup>172</sup> and a requirement to file the agreements would impose a substantial burden on providers and jeopardize confidential market sensitive information.<sup>173</sup>

71. *Discussion.* Because we find that the record is sufficient to codify automatic roaming obligations of CMRS carriers, we deny the Joint Petition. Petitioners contend that a Section 403 inquiry will assist the Commission in gathering necessary information to support the adoption of an automatic roaming rule and further supplement the record in this proceeding.<sup>174</sup> In light of our codification of automatic roaming obligations today and related findings, parties who wish to challenge the proposed terms of a roaming agreement as unreasonably discriminatory or unjust can file complaints before the Commission on a case-by-case basis.<sup>175</sup> The Commission has broad discretion to obtain any relevant information to resolve such complaints at that time, if needed.<sup>176</sup> Therefore, we deny the Joint Petition.

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<sup>166</sup> See Cingular Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006; Sprint Nextel Opposition to Joint Petition for Section 403 Investigation, WT Docket No. 05-265, filed May 5, 2006; Verizon Wireless Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006.

<sup>167</sup> See Reply to Oppositions, WT Docket No. 05-265, filed May 12, 2006.

<sup>168</sup> See Joint Petition at 5.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> See Cingular Opposition at 3; Sprint Opposition at 1; Verizon Wireless Opposition at 2.

<sup>172</sup> See Cingular Opposition at 4; Sprint Opposition at 4; Verizon Wireless Opposition at 6.

<sup>173</sup> See Sprint Opposition at 5; Verizon Wireless Opposition at 8.

<sup>174</sup> See Joint Petition at 1, 5.

<sup>175</sup> See *supra* ¶¶ 24-26.

<sup>176</sup> See *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000) (the Commission has broad discretion whether to grant discovery requests in section 208 proceedings); In the Matter of SBC Communications, Inc., *Apparent Liability for Forfeiture*, 17 FCC Rcd 7589, 7594 ¶ 11 (2002); Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Providers, *Report and Order*, 12 F.C.C.R. 22497, 22615 ¶ 291 n.782 (1997) (continued....)